IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ALLSTARS, PT's, SUGARS, XTC, JANE ROE I, and JANE ROE II,	)	
Plaintiffs,	)	
PARADISE ENTERTAINMENT, INC., and NEVADA, INC.,	)	
Plaintiff-Intervenors,	)	
vs.	)	CIVIL ACTION NO. SA-03-CA-356-FB
CITY OF SAN ANTONIO, TEXAS,	)	
Defendant.	)	

INTERIM ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' AND PLAINTIFF-INTERVENORS' REQUEST FOR PRELIMINARY RELIEF

**And Salomé, dressed only in seven thin veils,
danced lasciviously at a men's club called
the Palace . . . of King Herod, that is.**

**The result was a fatal secondary effect
for John the Baptist.**

Adapted and paraphrased by the Court from the Bible, Mark 6:16-28,
and the play Salomé written by Oscar Wilde
starring Sarah Bernhardt as Salomé and produced in Paris in 1894.

* * * * * * * * * * *

Plaintiffs and plaintiff-intervenors (hereinafter referred to collectively as "plaintiffs") are businesses and individuals who benefit monetarily from the public exposure of private parts. Plaintiffs clothe themselves in the First Amendment of the United States Constitution to provide cover against an alleged naked grab of unconstitutional power by local government.

29.

Defendant City of San Antonio, through its duly elected representatives, seeks to regulate modern day Salomés and Sarah Bernhardts for constitutional prevention of negative secondary effects.[1] Accomplishment is sought by Ordinance 97497, aptly named the Human Display Ordinance ("the Ordinance").

As this legal contest begins the first inning, the Court has several observations before entering an interim order governing the relationship of the parties until this matter is concluded:

1. The City of Houston began its first inning in January, 1997, by passing a similar ordinance. If each year is an inning, Houston is now in the seventh and nowhere near resolution.[2]

2. As long as Homo sapiens are driven by hormones and money, Economics 101 will supply the demand for adult entertainment. Though opponents of sin and crime would no doubt like to put plaintiffs out of business, the legal reality is that the United States Supreme Court has found such physical expression to be protected speech under the First Amendment whether performed in upper class New York Broadway plays or working class San Antonio establishments. See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991); City of Renton v. Play-time Theatres, Inc., 475 U.S. 41, 46-47 (1986); see also City of Erie v. Pap's A.M., 529 U.S. 277, 308 (2000) (Scalia, J., concurring) ("There is no basis for the contention that the ordinance does not apply to nudity in theatrical productions such as Equus or Hair.").

3. Plaintiffs should pragmatically recognize we are no longer in the 1880's Wild West of unregulated capitalism, gambling, saloons and prostitution. Plaintiffs will in some form and fashion be restricted and policed.

4. Supporters and opponents of the Human Display Ordinance can resolve this dispute longer and more expensively in about 2010 through protracted litigation. Alternatively, plaintiffs and defendant can face the realities of the previous three observations and come to a sooner and less expensive conclusion by writing an ordinance acceptable to saints and sinners alike and clearly within constitutional boundaries.

---

[1] The secondary effects are prostitution, promotion of prostitution, indecent exposure, lewd conduct, illegal drug possession, illegal drug dealing and the transmission of sexually transmitted diseases.

[2] Judge Atlas issued her opinion in N.W. Enters., Inc. v. City of Houston, 27 F. Supp. 2d 754 (S.D. Tex. 1998), on August 7, 1998. Oral argument was recently held before the Fifth Circuit Court of Appeals. An opinion has not yet been issued.

THE ORDINANCE

The Ordinance imposes new structural, visibility and lighting requirements on sexually oriented businesses and adds new regulations affecting individuals working in sexually oriented businesses. The new structural provisions will require many businesses to remodel their interior spaces to include a "manager's station" with an unobstructed view of almost the entire floor. The new regulations will ban public nudity and prohibit touching between entertainers and patrons. Moreover, owners and managers who work in sexually oriented businesses will be required to obtain individual permits, for which they must divulge personal information and undergo criminal backgrounds checks.

Plaintiffs filed a complaint and application for a temporary restraining order and preliminary injunction on May 2, 2003. Plaintiff-intervenors filed their complaint and application for a temporary restraining order and preliminary injunction on May 12, 2003. The Court believes this case will proceed most efficiently if first consideration is given to those sections of the Ordinance which the City of San Antonio considers essential for immediate enforcement. The City agreed not to enforce the remainder of the Ordinance during a period in which the Court will consider whether all or part of this challenge could be resolved through legal briefs and documentary evidence without a trial. Following a hearing on May 14, 2003, the Court entered an order preserving the status quo until this order could be drafted. The City of San Antonio submits there are four prohibitions in the Ordinance which it seeks to exempt from a preliminary injunction:

* A ban on total nudity;
* A ban on touching by entertainers;
* A ban on private rooms in human display establishments; and
* A ban on locked "VIP" rooms.

PRELIMINARY INJUNCTION

With reference to the requests for a preliminary injunction, a plaintiff must satisfy its burden on each of four preliminary injunction factors:

> First, the movant must establish a substantial likelihood of success on the merits. Second, there must be a substantial threat of irreparable injury if the injunction is not granted. Third, the threatened injury to the plaintiff must outweigh the threatened injury to the defendant. Fourth, the granting of the preliminary injunction must not disserve the public interest.

Evergreen Presbyterian Ministries, Inc. v. Hood, 235 F.3d 908, 918 (5th Cir. 2000) (quoting Harris County v. CarMax Auto Superstores, Inc., 177 F.3d 306, 312 (5th Cir. 1999)). Preliminary injunctions are considered to be "extraordinary and drastic remed[ies], not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." Id. at 917 (quoting White v. Carlucci, 862 F.2d 1209, 1211 (5th Cir. 1989)). A district court's decision is reviewed for an abuse of discretion. Id.

DISCUSSION

Section 21-701(7) of the Ordinance provides: "It shall be unlawful for any dancer, entertainer, or model to entertain while in a state of nudity." Section 21-701(7). The United States Supreme Court has held that an enactment banning nude dancing does not impose an impermissible content-based restriction on free expression as long as the City produces evidence that the challenged ordinance advances its interest in combating adverse secondary effects attendant to nude dancing. City of Erie v. Pap's A.M., 529 U.S. 277 (2000). For purposes of this preliminary injunction order, the Court finds sufficient evidence in the legislative record to reasonably conclude that crime and other public health and safety problems are caused by the presence of nude dancing establishments and that a ban on such nude dancing would further the City's interest in preventing such secondary effects. Defendant's Exhibit D1A and Defendant's Exhibit D1B. The City is therefore allowed to

enforce the ban on total nudity. The preliminary injunction as to Section 21-701(7) is **DENIED.**

Section 21-701(5) of the Ordinance states: "It shall be unlawful for any dancer, entertainer, or model to intentionally or knowingly touch another person, or the clothing of another person while entertaining or while in a state of semi-nudity." Section 21-701(5). The Fifth Circuit has held that a no touch provision in a city ordinance regulating adult-oriented businesses prohibiting touching between an entertainer and a patron, if enacted for the purpose of combating negative secondary effects, is not an unconstitutional content-based restriction on free expression. Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 483-84 (5th Cir. 2002); Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1253 (5th Cir. 1995). Based on the record before the city council, the Court concludes that the City has presented sufficient evidence that the provision prohibiting touching between an entertainer and a patron was enacted for the purpose of combating negative secondary effects associated with adult entertainment, including the prevalence of criminal public lewdness. Defendant's Exhibit D1A and Defendant's Exhibit D1B.

While the Fifth Circuit has not addressed the issue, the Sixth Circuit Court of Appeals has upheld an ordinance requiring a six foot buffer zone between entertainers. DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 408-13 (6th Cir. 1997). However, at this early stage in the proceedings, it is not clear that evidence was before the city council to support this provision. Until such time as the City meets its evidentiary burden, the preliminary injunction as to touching between entertainers is **GRANTED.** The City is allowed to enforce the ban on touching, Section 21-701(5), solely as it applies to entertainers and patrons.

Section 21-701(10) through the definition of "Configuration or configured" contained in the Ordinance states: the interior layout of the establishment shall be in such a manner that "an on-site manger has an unobstructed view of the entire floor to which a customer or patron on the premises

of the premises of the Human Display Establishment is allowed access, but excepting a view inside a lavatory, and if applicable, a stairway or elevator between floors." Section 21-200 ("Configuration or configured") (3); Section 21-701(10). For purposes of preliminary relief, the City seeks to enforce this provision which effectively would prohibit entertainment from being provided in private rooms and locked VIP rooms. The Fifth Circuit has upheld as constitutional a provision requiring that the interior of an adult business be configured so management or law enforcement personnel have unobstructed views of the premises. LLEH v. Wichita County, 289 F.3d 358, 368 (5th Cir. 2002) (quoting TK's Video, Inc. v. Denton County, 24 F.3d 705, 723 (5th Cir. 1994)). An "unobstructed view" provision, however, does not necessarily prohibit entertainment from being provided in an enclosed area of a sexually oriented nightclub. In N.W. Enters., Inc. v. City of Houston, the District Court declined to enforce a provision banning a VIP room which was to be separated from the main part of the adult cabaret by a completely transparent heavy glass door with no locking mechanism and which would provide a clear line of sight which conformed with all the ordinance's other structural, visibility, lighting, supervision, and police access requirements. 27 F. Supp. 2d 754, 892-94 (S.D. Tex. 1998). In this case, the City appears to seek a similar result. In its advisory, the City does not argue that the Ordinance bans an adult cabaret from placing a door at the entrance of an enclosed area. Rather, it suggests the Court incorporate the following language in any preliminary injunction order:

> *No private rooms permitted:* There shall be no "private" rooms, booths, areas or enclosures, permanent or portable, where customers and entertainers are allowed together and where any portion of the customer or entertainer is secluded or out of the direct line of sight of any other person in the establishment.
>
> *No locked "VIP" rooms:* Except the lavatory, no door to any area where customers or patrons are allowed shall be locked.

The Court finds this language consistent with legal precedent. Therefore, the Court **ORDERS** that the "unobstructed view" provision with respect to private rooms and VIP rooms shall be enforced as set forth above, provided these enclosed areas conform with the Ordinance's lighting requirements in Section 21-200, Configuration or Configured, subsection (4).

IT IS THEREFORE ORDERED that the applications for preliminary injunction are GRANTED in PART and DENIED in PART as set forth above. Until further Order of the Court, the City of San Antonio is ENJOINED from enforcing Ordinance 97497 with the EXCEPTION of the ban on total nudity and the ban on touching between an entertainer and a patron. The City may enforce the unobstructed view provision of the Ordinance as it relates to private rooms and locked VIP rooms only as set forth herein.[3]

It is so ORDERED.

SIGNED this 19th day of May, 2003.

FRED BIERY
UNITED STATES DISTRICT JUDGE

---

[3] Subject to this Order, the following Sections of Ordinance 97497 may be enforced by the City:

(a) The following definitions of terms listed in Section 21-200:
  (1) "Nude" or "nudity" or "state of nudity";
  (2) "Public place";
  (3) "Semi-nude" or "semi-nudity" or "state of semi-nudity"
  (4) "Specified sexual activities";
  (5) "Specified criminal act";
  (6) "Configuration or configured" (3), (4);
(b) Sections 21-300(1), (3), and (5);
(c) Section 21-302(1);
(d) Section 21-303(1), limited to the sections of the Ordinance for which enforcement is not restrained;
(e) Section 21-701 (5), (6), (7), (8), (10), (12), (13), and (16).